No. 10,973

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN EDWARD YATES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

ALFRED J. HENNESSY,
De Young Building, San Francisco 4,
Attorney for Appellant.

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STATEMENT OF THE JURISDICTIONAL FACTS.

The appeal herein presented by John Edward Yates is from an order of the District Court of the United States for the Northern District of California, Southern Division, denying his motion for a new trial in criminal case No. 28,423, entered on the 23rd day of March, 1944 (R. p. 10), and from the judgment of the District Court entered on March 23, 1944, sentencing the said appellant, John Edward Yates, to serve a sentence of 5 years in a federal penitentiary. (R. p. 10.) Notice of appeal from said order and judgment was filed by appellant on March 23, 1944. (R. p. 11.) On March 28, 1944, appellant filed his statement of

points on which he intended to rely on his appeal. (R. p. 13.)

The appellant, John Edward Yates, was a messman aboard the armed transport, "President Johnson", and during an altercation with a sailor, Henry Frederick Olsen, stabbed Olsen while on the high seas on waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States, to-wit, at Purvis Bay, Florida Islands, Solomon Islands Group, and after the occurrence the defendant was first brought into the City and County of San Francisco, within the Southern Division of the United States District Court, and within the jurisdiction of this Court. (R. pp. 2, 3 and 24.)

STATEMENT OF CASE AND QUESTIONS INVOLVED.

The appellant, John Edward Yates, was a messman aboard the Army Transport "President Johnson". Henry Frederick Olsen was a sailor aboard the same ship. They were both members of the crew of the "President Johnson". (R. p. 25.) Olsen's rating was that of a boatswain. A boatswain acts as foreman of the sailors. He is a civilian employee and not in the armed forces of the United States. Yates is a messman. A messman is one who works in the petty officers' mess, taking care of the petty officers and serving their meals like a waiter. Petty Officer Olsen is a superior in rank to Yates, but he is not over him. Olsen has no connection with the steward's department; Yates waits on him as a waiter, but Olsen is not

over him in the line of duty. Olsen is classed as a petty officer; Yates is not. Yates is a civilian employee on the boat. (Cross-examination of Captain Herbert J. Ehman of the "President Johnson". (R. pp. 25 and 26).)

There was a shortage of messmen on the said transport and there was some delay in Olsen getting his breakfast. He complained to Yates about the delay and when Olsen was finally served took offense at the manner of placing his plate on the table and got up from the table with the intention of hitting Yates and according to Olsen there was a clinch and something in the nature of a fight which ended in the alleyway outside the messroom.

"Q. Did he bounce the plate down on the table then?

A. Yes.

Q. Did you have any words with him at that time?

A. No, I got up from the table with the intention of hitting Yates, but I did not.

Q. You did not hit him?

A. No, we got engaged in some kind of a scuffle in the corner of the messroom which ended up in the alleyway outside." (Testimony of Henry Frederick Olsen, who was cut. (R. p. 28).) Also on pages 34 and 35 there is testimony to the same effect.

Yates' testimony was to the effect that he was without help in serving 40 or 50 men and that Olsen demanded priority over the other men, which he was unable to accord him; that he served Olsen in the

same manner as the other men. There was one messman lacking. (R. p. 33, line 7.) Olsen was the aggressor according to his own testimony:

Testimony of Henry Frederick Olsen.

"A. At that time I got up when the food was set in front of me, with the intention of hitting Yates.

Q. Just a minute, as soon as he laid the plate down in front of you did Mr. Yates say anything to you?

A. No. (33)

Q. Did he hit you?

A. No.

Q. Did he push you?

A. No.

Q. He just merely laid the plate down in front of you and you immediately got up?

A. Yes.

Q. With the intention of hitting him?

A. Yes.

Q. Did you jump up?

A. Yes, I jumped up.

Q. You jumped up at him, didn't you?

A. Yes.

Q. How far away was he when you jumped up with the intention of hitting him?

A. He was at the next table.

Q. How far away from you?

A. About ten feet away from my table.

Q. Did you make a dash for him?

Q. He had his back to you and he walked away from you?

A. Yes.

Q. As you reached him you struck him, didn't you?

A. No.

Q. Are you sure of that?

A. Yes.

Q. What did you do?

A. He turned around and we got into some kind of scuffle and clinched in the corner of the messroom."

From testimony of Henry Frederick Olsen (R. pages 34 and 35), Yates said to me "What is the matter with you, anyway?" (R. p. 35.)

Testimony of John Edward Yates.

"Q. You were on the way to the messroom?

A. Yes.

Q. You say you used that knife in your work?

A. Yes.

Q. To do what?

A. Well, I was supposed to carry that to clean plates.

Q. An ordinary table knife?

A. Yes.

Q. Now, when Mr. Olsen raised his right hand, what did you say, what did you say?

A. When he raised his right hand I raised my hand, and when I raised my hand he seen the knife and he started this way and I jabbed at him like that.

Mr. Abrams. Q. What did you think when he raised his hand?

A. I didn't know what he was doing.

A. I thought he was going to hit me.

Q. You thought he was going to strike you?

A. Yes.

Q. Go ahead.

A. When I raised my hand he seen my knife and he came toward me.

Q. He came toward you with his arm up?

A. No, he did not have his arm up when he came toward me.

Q. Then you stabbed at him with the knife?

A. Yes, stabbed at him with knife.

Q. Did you jab hard?

A. No.

Q. When you jabbed at him with it did you intend to kill him?

A. I had no intention of even jabbing him with the knife, I was nervous and excited, and I had no intention on my part whatsoever of doing that." (Testimony of John Edward Yates on pp. 52 and 53.)

Testimony of John R. De Lora.

"I was in the pantry; at the time I was cutting some grapefruit, and I heard the commotion out there, but I did not see the beginning of the fight, and then I saw Mr. Yates going down towards the forecastle, and he was bleeding and he had his shirt all torn."

Cross-Examination
of Mr. De Lora.

"I was standing there when Yates came back. I saw Mr. Olsen started to rush toward Yates. They were about two or three feet apart. Yates was still walking toward Olsen, toward the messroom. To go to the messroom he had to go by Olsen. From the

direction I saw Yates, I would say he was going to go by and go to work. He came at Yates with his hands up, like he was going to punch him. His hand was up; it was like he was rushing out to grab him." (John De Lora's testimony R. pp. 60 and 61.)

Henry Frederick Olsen by his own admission was the aggressor. He jumped up in the messroom and rushed at Yates and attacked him and in the struggle forced Yates out into the alleyway where the fight continued and there according to Olsen testified (R. p. 29) Yates said to him, "What's the matter with you anyway?"

The testimony of John R. De Lora (R. pp. 60 and 61) at the second encounter in the alleyway where Olsen again was the agressor and Yates was only protecting himself.

SPECIFICATIONS OF ERROR.

The learned Court erred in not giving defendant's requested instructions on assault and in not giving the three requested instructions by the Government, or either of them, on assault, copies of which are appended hereto, in this:

(a) There is evidence tending to show that the defendant committed assault only, if anything, in that the defendant testified that he thought the witness Olsen was attacking him and that he did not intend or mean to use the knife he had in his hand against Olsen, but only intended to ward off the blow of assailant Olsen,

which testimony is corroborated by the only eye-witness who observed the actual affray.

(b) The entire case was tried and argued by the government and the defendant both on the theory that the evidence justified the return of a verdict of assault if the evidence relevant thereto was believed; whereas, the learned Court permitted the case to be tried and argued both by the government and the defendant on the theory that an instruction on assault would be given, lulling defendant and defendant's counsel into unfortunate false security, and it was not until the final instructions were given that either the government or the defendant, or his counsel, knew that the instructions of assault would not be given, thereby, in fact, depriving the defendant of a jury trial and the due process of law on the issues upon which the instructions actually were given.

(c) The learned Court erred in not instructing or advising the defendant that on three occasions the jury had transmitted communications to him and that on the first two of those occasions, only defendant's counsel was advised of the requests and the defendant was at all times ignorant of all [84] three requests for instructions; that further the learned Court failed to advise the defendant of his response to the jury except in the second instance when the jury was returned to the court room and given further instructions; that on the third occasion of the request of the jury for further instructions the learned Court further erred in advising the Cryer, outside of the presence of and without the knowledge of either the defendant or

his counsel, to go to the jury room and outside of the presence of and without the knowledge of either the defendant or his counsel, and instruct the jury on a point of fact and law, the exact nature of the instruction being now impossible of determination due to conflicting testimony as to what was exactly said by the Cryer, although witnesses were in general agreement that he instructed the jury on behalf of the learned Court to return a verdict on the forms submitted, to it, which did not include an instruction for assault and on which subject the jury had requested further instructions:

For the reasons stated above in Specifications (a) (b) and (c) the learned Court erred in not instructing the jury to return a verdict for the defendant and in not granting defendant's motion for a new trial in that the verdict and judgment was contrary to the law and evidence in the case and in contravention of defendant's constitutional right and without due process of the law, equal protection of the law, and of a full jury trial in violation of Articles 3, 4, 5, and 6, of the Amendments to the Constitution of the United States for the reasons stated both severally and separately and cumulatively in the said Specifications (a), (b), and (c) above.

(d) The judgment of conviction is void and a nullity because the verdict returned by the jury and duly recorded by the Court, reads as follows:

> "We the jury find John Edward Yates, the defendant as Guilty Of An Assault with a Deadly Weapon."

ARGUMENT.

The evidence adduced at the trial on the admissions of Olsen, the other party to the fight, prove conclusively that Olsen was the aggressor and rushed at Yates and made an unwarranted attack on him. That Yates broke away from him and went away and was returning to his work when he was again attacked by Olsen; De Lora was an eye witness to the second attack. The evidence discloses a clear case of justifiable self defense in the defense of his person.

Roe v. U. S., 164 U.S. 546, 512 L. Ed. 547;
Acres v. U. S., 164 U.S. 388, 41 Law. Ed. 481;
Wallace v. U. S., 162 U.S. 466, 40 Law. Ed. 1039.

The Court should have given defendant's requested instruction on simple assault and the three requested instructions by the government, or either of them on simple assault. The defendant was convicted of the crime of an assault with a deadly weapon. (R. p. 9.) Assault is an included offense and the Court should have given the requested instruction.

"The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged or of an attempt to commit the offense. Thus the offense of assault with a deadly weapon is necessarily included in that of an assault to commit murder and where the charge is assault with a deadly weapon, the jury may return a verdict of simple assault.

3 *Cal. Jur.* page 224. Sec. 32.
Ex parte Donahue, 65 Cal. 474.

Defendant's proposed instruction No. 12, page 101, of the transcript of the record should have been given.

That the learned Court erred to the prejudice of the defendant when he instructed the jury on a point of fact and law without bringing them into Court and instructing them in the presence of the defendant and his counsel there can be no doubt. The exact nature of the instruction the defendant and his counsel were unable to ascertain and were therefore unable to take an exception to it.

THE JUDGMENT OF CONVICTION IS VOID AND A NULLITY BECAUSE THE VERDICT RETURNED BY THE JURY AND DULY RECORDED BY THE COURT READS AS FOLLOWS:

"WE THE JURY, FIND JOHN EDWARD YATES, THE DEFENDANT AT THE BAR, GUILTY OF AN ASSAULT WITH A DEADLY WEAPON."

The verdict returned by the jury, and recorded, is utterly void and a nullity because it does not use the words "as charged" or state all of the elements of the criminal offense depicted and delineated by Section 455, Title 18, U. S. C., which reads in part as follows:

> "Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing * * *" shall be punished as the law provides.

In the case of *U. S. v. Buzzo,* 85 U. S. 125, 21 L. ed. 812, the syllabus reads as follows:

> "On an information under the Ninth Section of the Internal Revenue Act of July 13th, 1866,

which enacts that any person who shall issue any instrument, etc., for the payment of money, without the same being duly stamped, with intent to evade the provisions of this act, shall forfeit and pay, etc., an intent to evade is of the essence of the offense, and no judgment can be entered on a special verdict which, finding other things, does not find such intent."

In the case of *U. S. v. Jackalow,* 66 U. S. 484, 17 L. ed. 225, Mr. Justice Bradley, speaking for the Supreme Court, said:

> "As in this case the intent is the essence of the crime, and is not found, no judgment can be entered on the verdict, whether the facts disclosed therein required a stamp to be affixed to the draft or not. To decide the question proposed, therefore, would avail nothing. An imperfect verdict, or one on which no judgment can be rendered, must be set aside, and a *venire de novo* awarded. The case must therefore be dismissed."

It is respectfully urged that the judgment of conviction, and the order denying and refusing a new trial, should be reversed.

Dated, San Francisco,
May 14, 1945.

Alfred J. Hennessy,
Attorney for Appellant.